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January 29, 2002

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**Ex Parte Filing**

Magalie Salas, Secretary  
Federal Communications Commission  
236 Massachusetts Avenue, NE  
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Washington, DC 20002

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Re: Implementation of the Pay Telephone Reclassification and Compensation  
Provisions of the Telecommunications Act of 1996, **CC Docket No. 96-128**

Dear Ms. Salas:

I have enclosed for filing two copies of a letter I sent today to Mr. Jeffrey Carlisle in reference to the above-captioned docket. In accordance with 47 C.F.R. § 1.1206(b)(1), please include this letter in the record of this proceeding.

If you have any questions concerning this matter, please contact me at (202) 326-7921.

Sincerely,

  
Aaron M. Panner

Enclosure

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Mr. Jeffrey Carlisle  
Senior Deputy Chief, Common Carrier Bureau  
Federal Communications Commission  
445 12th St., S.W.  
Washington, D.C. 20554

Re: Implementation of the Pay Telephone Reclassification and Compensation  
Provisions of the Telecommunications Act of 1996, CC Docket No. 96-128

Dear Mr. Carlisle:

I am writing in response to recent ex parte presentations by the American Public Communications Council, in which the APCC argues that the Commission can establish different compensation rates and/or mechanisms for independent payphones and LEC-affiliated payphones. The APCC is wrong, and its special pleading should be dismissed out of hand.

Since April 1997, LEC-affiliated and independent payphones have stood on an equal competitive footing in terms of the sources and amounts of compensation received. Pursuant to the explicit mandate in section 276, the Commission eliminated all access charge support for LEC-affiliated payphones and required that all payphone providers pay the same rates for the same services. See 47 U.S.C. § 276(b)(1)(B). Instead, LEC-affiliated and independent PSPs alike have had to look to comparable sources of revenue. To establish a different compensation mechanism or compensation amount for LEC-affiliated and independent payphones for any period after April 1997 would be to create the type of discrimination that Congress explicitly barred.

The situation prior to enactment of the 1996 Act and the Commission's regulations thereunder is irrelevant to the question whether the Commission can create a distinction in treatment of PSPs in light of the statute's prohibition on such distinctions. As a matter of fact, however, independent PSPs stood at a significant competitive *advantage* prior to the 1996 Act

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and were, on average, far more highly compensated for the services they provided to IXC's than were LEC-affiliated PSPs. Independent PSPs collected commissions on interstate long-distance calls from IXC's, while BOC PSPs were barred from collecting any such commissions. On top of the commissions paid to independent PSPs — which were on average far higher than payphone access charge elements — independent PSPs collected an *additional* lump-sum payment of \$6 each month. Not surprisingly, while the number of LEC-affiliated PSPs stagnated prior to 1996, the number of independent payphones rocketed from approximately zero to half a million in a decade.

Nor is there any validity to the argument that relatively minor problems affecting Flex ANI in 1998 would justify any difference in treatment for independent payphones. As an initial matter, the Commission found that almost 80 percent of payphones were served by switches transmitting Flex ANI digits by March 1998.<sup>1</sup> Moreover, whether Flex ANI problems affected a PSP does not depend on whether the PSP was independent or LEC-affiliated, but on the type of payphone line the PSP chose to use. Many LEC-affiliated PSPs (like most independents) use smart phones connected to dumb lines; independents are fully able to use smart lines if that is in their overall business interest. Just as important, the Commission adopted a compensation mechanism in April 1998 to ensure that all PSPs would be fairly compensated for calls, even in cases where Flex ANI was not fully implemented.<sup>2</sup> The APCC has never challenged that compensation mechanism. Accordingly, the Coalition's proposal — using compensation obligations during the corresponding period in 1997-1998 to estimate compensation obligations for the interim period — remains the best and fairest method yet proposed for calculating interim payments.

The APCC's opposition to the proposed method has nothing to do with any concerns about administrative problems (none has ever been credibly identified) or supposed unfairness, and everything to do with its efforts simply to block resolution of the interim compensation issue for as long as possible. The reason for this is that APCC's members (unlike LEC-affiliated PSPs) were generally quite well compensated during the interim period because of the timing of payments and regulatory review. Payments of interim compensation to independent PSPs began for the period starting in November of 1996. IXC's commonly made initial payments to independents based on a \$.35 per-call rate, and continued payments to independents, sometimes based on lower rates, even after the D.C. Circuit vacated the *First Payphone Order*. By contrast,

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<sup>1</sup> See Memorandum Opinion and Order, *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 13 FCC Rcd 4998, 4999-5000, ¶ 1 (Com. Car. Bur. 1998).

<sup>2</sup> See Memorandum Opinion and Order, *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 13 FCC Rcd 10893 (Com. Car. Bur. 1998).

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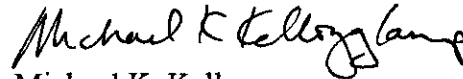
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LEC-affiliated PSPs have received very little compensation for the interim period. The APCC has nothing to gain and something to lose if the Commission finally resolves this issue in an even-handed way.

Independent payphone providers have exploited significant regulatory advantages to capture a disproportionate share of the most valuable payphone locations prior to the unshackling of LEC-affiliated PSPs in 1997. Independent PSPs continue to reap the benefits of that head-start, by collecting per-call compensation payments that are, on a per-phone basis, presumably well above those of LEC-affiliated PSPs, despite the absence of any evidence that independent PSPs have higher costs. To deliver independent PSPs yet another special regulatory advantage by differentiating in the mechanism or amount of compensation for any period after April 1997 would not only be blatantly unlawful, but it would be wholly unjustified by any consideration of policy.

Sincerely,

  
Michael K. Kellogg

cc: Kyle Dixon  
Matthew Brill  
Jordan Goldstein  
Samuel Feder  
Tamara Preiss  
Lynne Milne